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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,

v.

JAMES D. COLE, SR. and JAMES D. COLE, JR.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Illinois correctly held that the trial and conviction of the Defendants, James D. Cole, Sr. and James D. Cole, Jr., for the offense of Solicitation To Commit Murder did not violate the constitutional bar against double jeopardy.

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The Defendants, James D. Cole, Sr. and James D. Cole, Jr., petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 61 Ill. Dec. 793, 435 N.E. 2d. 490, and is attached to this Petition in the Appendix A. The Order of the Supreme Court of the State of Illinois denying the Defendants' Petition for Re-Hearing, entered May 27, 1982, is attached secondly in Appendix B of this Petition. The Opinion of the Appellate Court of Illinois, Third District, reversed by the Supreme Court, is reported at 98 Ill. App. 3d 309, 53 Ill. Dec. 758, 424 N.E.2d 393, and is attached in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois, was entered on April 16, 1982. Defendants' Petition for Re-Hearing was denied May 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) by virtue of Defendants' claim that they were denied the right guaranteed by the Constitution of the protection against double jeopardy.

CONSTITUTIONAL PROVISION

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *U.S.C. Const. Amend. V*

STATEMENT OF FACTS

On January 15, 1980, Defendants were indicted; in Count I, with soliciting the murder of Robert H. Jones by requesting William Haley to commit that offense; in Count II, with soliciting the murder of Robert H. Jones by encouraging William Haley to commit that offense; and in Count III, with

conspiring to murder Robert H. Jones by agreeing with each other and William Haley to commit that offense (C-3).[1]

The direct testimony of Illinois Division of Criminal Investigation agent William Haley, in each trial, indicated that both trials concern the same transaction. Insofar as relevant for this limited purpose that testimony is that Haley contracted on Friday, January 11, 1980, and in an undercover capacity to murder Robert H. Jones on behalf of Defendants (R1-85, R2-146). On Tuesday, he had met with the informant Al Martin who set up a meeting with Defendant, Cole, Jr., at his place of business (R1-7, R2-96). Haley met with Cole, Jr. the following noon (R1-9, R2-99) and again, for lunch on Friday (R1-11, R2-103). That evening, Haley met with both Defendants in a parking lot (R1-52, R2-114). He was driven to a residential suburb and the home of the intended victim was shown to him (R1-66, R2-132). Upon returning to the parking lot, the price of $1500.00 was agreed upon (R1-71, R2-137). A deposit of $200.00 was paid to Haley (R1-66, R2-132). Defendants were arrested later that night.

Upon trial by jury on April 7, 1980, Defendants were acquitted of Counts I and III. The Court entered a mistrial as to Count II upon which the jury was unable to agree (C-93). Defendants thereupon moved for discharge from any further prosecution under Count II upon the grounds that a retrial would place Defendants in double jeopardy. This motion was denied on April 22, 1980 (C-95). On June 9, 1980, Defendants again moved for dismissal of Count II which motion was denied on that day and the trial began (C-124). At this trial the jury convicted (C-202).

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[1] "C" refers to the common law record.

R1 Refers to the transcript of testimony taken in the first trial of the Defendants;

R2 Refers to the transcript of the second trial.

On July 10, 1980, Defendants moved to arrest the judgment (C-203). This motion was denied on July 18, 1980, and each Defendant sentenced to five (5) years imprisonment (C-213).

REASONS FOR GRANTING THE PETITION

The opinion of the Supreme Court of the State of Illinois is in direct conflict with the double jeopardy provision contained in the Fifth Amendment to the Constitution of the United States. The sole issue raised throughout review of the Defendants' convictions has been that the second trial and conviction of the Defendants denied them the constitutional right and protection of the double jeopardy provision.

The Defendants were each charged in a three count indictment with two Illinois Statutory offenses. One of the three counts charged the offense of conspiracy to commit murder. Defendants were acquitted of that offense at their first trial and no issue remains as to that offense. The remaining two counts were brought out of the single statutory offense of solicitation (to commit the offense of murder). The Illinois Statute defining the offense of solicitation reads as follows:

> "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." (Ill. Rev. Stats., Ch. 38, Sec. 8-1(a))

As indicated in the Statement of Facts, all of the charges related to a single transaction. Defendants were charged with conspiring to commit the murder of, and soliciting the murder of, a single person, one Robert H. Jones.

Both trials of the Defendants were based upon the same set of facts. The State chose to charge Defendants with the offense of solicitation in two counts, by charging in one count that they "requested" the commission of murder and charging in the other count that they "encouraged" the commission of murder.

It is clear from the facts and a reading of the Solicitation Statute that the Defendants were charged with a single offense,

albeit in two counts. As indicated in the opinion of the Illinois Supreme Court in this case, the "State conceded that there is only one crime of solicitation." *People* v. *Cole,* 61 Ill. Dec. 793, at 794, 435 N.E.2d 490 (Illinois Supreme Court) (Page 2 of the Court's Opinion attached in the Appendix A). It is clear from the opinion of the Court that the Court agreed that there is but one single offense of solicitation.

However, the Illinois Supreme Court proceeded to turn the issue upside down. The Court referred to a general principle that a mistrial carries different double jeopardy ramifications than an acquittal; that a mistrial, declared because the jury was unable to reach a decision, does not bar a new trial. In support of this reasoning the Illinois Supreme Court relied upon an opinion of the United States Supreme Court issued in *Lee* v. *United States,* 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977). The key part of the portion cited by the Court, and apparently relied upon, reads as follows: "A mistrial ruling invariably rests on grounds consistent with reprosecution..." *Lee* v. *United States,* 432 U.S. at 30, 97 S. Ct. at 2145, 53 L. Ed. 2d at 87.

The Illinois Supreme Court's reliance on *Lee* is incorrect. *Lee* did not involve a case where a single offense was fragmented into two separate counts and where the Defendant stood acquitted on one of the fragmented counts. By relying on *Lee,* the Supreme Court of Illinois allowed what amounts to an exception to the rule against double jeopardy to swallow the rule.

Rather than looking at the issue with the stress on the mistrial, the issue should be examined in light of the plain meaning of the words of the double jeopardy provision of the Fifth Amendment to the United States Constitution. "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." U.S.C. Const. Amend. V. At the end of their first trial Defendants had a jury verdict acquitting

them of the offense of solicitation. Their subsequent re-trial for the same offense of solicitation caused them to "be twice put in jeopardy" and their subsequent conviction was therefore obtained in violation of the Constitutional proscription.

This becomes even clearer when examined on the basis of the Illinois Statutory embodiment of the double jeopardy provision.

> "A prosecution is barred if the Defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction. Ill. Rev. Stats., 1979, Ch. 38, Sec. 3-4(a)

The Defendants were prosecuted for the same offense in both trials. Both prosecutions were based upon the same facts. There was a verdict of acquittal rendered by the jury as to the offense of solicitation in the first trial. The case at bar meets the test expressed in the above statutory language.

The State was not required to fragment the solicitation charge into two counts. The Solicitation Statute uses the words to describe the means of committing the offense in the disjunctive. The State could have cited the offense in the disjunctive in a single count. However, the State did fragment the offense. Because the Illinois Supreme Court misapplied the double jeopardy provision, the Defendants stand both acquitted and convicted of the same single offense.

CONCLUSION

The opinion of the Illinois Supreme Court misinterprets and misapplies the double jeopardy provision of the United States Constitution. The Defendants were thus denied their right to the constitutional protection afforded them by that provision. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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